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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-121

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SCOTT PAPER COMPANY,

*Petitioner,*

v.

ELIGH WATKINS, et al.

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## BRIEF IN OPPOSITION

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### Jurisdiction

The jurisdiction requisites are adequately set forth in the petition.

### Question Presented

Would it frustrate the central statutory purposes of Title VII if an employer found guilty of pervasive, class-wide, racial discrimination were totally absolved of back pay liability to individual discriminatees because the Office of Federal Contract Compliance (OFCC) had required the employer to agree to a seriously inadequate and incomplete remedial plan, which plan the employer executed in a manner so as to render it virtually useless?

### Supplemental Statement of the Case

Until 1963, jobs at the Scott Paper Company's ("Scott" or the "Company") Mobile, Alabama facilities were strictly

segregated by race[1] (A. 2).[2] Blacks were confined to the lowest paid most menial positions. Whites were assigned to the better paying jobs.[3] Not until 1965 did Scott begin to assign newly hired black employees to traditionally all-white hourly wage production jobs (A. 3, 82-85). However, the over three hundred black employees hired previously were effectively barred from the better paying white jobs by newly instituted formal transfer requirements created by Scott to mark the occasion of desegregation. Employees seeking to transfer into formerly white line of progression production jobs were, for the first time, required to possess a high school education, pass an unvalidated aptitude test and be under age 36 (A. 3-4, 84-85). Predictably, by 1969, only seven[4] of the black employees hired prior to 1963 successfully negotiated these new transfer requirements. Even those few who were able to enter previously all-white jobs were "locked" into inferior positions by the familiar job and departmental seniority system which prevented them from catching up to their white contemporaries. See *Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied* 397 U.S. 919 (1970).

At the behest of OFCC, Scott, in 1969, agreed to effect certain seniority and job qualification changes in its em-

[1] The pattern of formal racial segregation practiced by Scott was substantially the same as those this Court reviewed in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

[2] The form of citation A. .... refers to the page in the appendix to this petition filed by petitioner Scott.

[3] All salaried, supervisory, maintenance craft and most production line of progression jobs were reserved for white employees (A. 2-3, 78-81, 113).

[4] Scott states that by 1969 one-third of the 300 affected class of black employees were in formerly all-white jobs (Pet. p. 5). In addition to the seven blacks who actually transferred into previously all-white lines of progression, the job classifications of other previously segregated blacks were tacked onto the bottom of certain white lines of progression. This as well as the inclusion of some post-1963 black hirees explains why one-third of the affected class were in previously all-white jobs by 1969 (A. 3, 87, 91).



ployment practices which were intended to allow its previously segregated black employees to reach their "rightful place." OFCC did not address and Scott did not undertake to change the aptitude tests and high school requirements that continued to exclude blacks from maintenance helper jobs.[5] Following a consistent practice,[6] OFCC did not seek back pay or other financial restitution for the class of discriminatees (A. 90, Scott's Exhibit 3).

The Memorandum of Understanding ("Memorandum") between Scott and OFCC merely set out the broadest outlines of the relief to be accorded the victims of longstanding racial discrimination at Scott's Mobile mill, and left Scott with broad and virtually unfettered discretion as to its implementation. Thus, the accomplishment of its "rightful place" objectives depended entirely on how the Company fleshed out its new seniority rules and qualification requirements and how it actually made transfer opportunities available to discriminatees. It is, therefore, crucial to consideration of Scott's petition that after an exhaustive review of a lengthy record the Court of Appeals found as a matter of fact that the way Scott implemented the Memorandum made it a "useless gesture" [7] (A. 10). Understandably, the Company has not sought review of this devastating finding here.[8]

[5] Additionally, neither party to the agreement addressed the standardless procedures utilized by Scott's all-white management which resulted in the exclusion of blacks from salaried supervisory positions.

[6] See fn. 14, *infra*.

[7] Predictably, at the time of trial in 1972, black employee earnings lagged far behind that of whites. The affected class averaged a whopping $1.00 per hour less than their white contemporaries (A. 2-3).

[8] Respondents are somewhat confounded by a suggestion in the petition that the appellate findings of improper implementation of the Memorandum may not be allowed to stand (Pet. 14). It is our contention that even if "Scott vigorously disagrees" with them (Pet. 14, n.14), these rulings do not present questions subsidiary to or fairly comprised in the single question presented in the jurisdictional statement of the petition. See Supreme Court Rule 15(c).

In the Court of Appeals only the union appellees argued, as the Company's petition now urges, that OFCC's sponsorship of the Memorandum of Understanding somehow insulates them from back pay liability.

## Reasons for Denying the Writ

While petitioner's question presented asks only for review of an issue recently disposed of in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), petitioner in its argument raises an issue not yet reached in the district court. We deal with the latter first and then respond to the *Moody* issue.

### The Extent to Which the Defendants May Invoke the OFCC Sponsored Memorandum to Avoid Back Pay Is Not Ripe for Review

The district court found both that Scott had not in fact discriminated against blacks and that even if it had the Company's "good faith" warranted denial of back pay to all members of the plaintiff class (A. 158). The Court of Appeals found that Scott unlawfully discriminated against the class both prior to and after it entered into the agreement with OFCC. Additionally, as Scott correctly asserts here, it held that "OFCC's involvement is not a reason to deny back pay to the plaintiff class"[9] (Pet. 6). That holding does not, as petitioner suggests,[10] require a back pay

[9] Respondents do not agree that the Fifth Circuit so ruled *as a matter of law.* The decision was based on findings of both fact and law (A. 66).

[10] For example, Scott closes its argument with this revealing assertion:

> [S]uch matters as whether particular employees understood their rights and whether Scott properly implemented the Memorandum in specific situations might give rise to *individual* back pay claims in particular instances but not to back pay relief to the *entire* class.

Pet. 14 (emphasis added).



award to every class member regardless of the merits of his individual case. The Fifth Circuit as well as every other circuit that has addressed this subject has never established such a blanket rule. See, *e.g., United States* v. *United States Steel Corp.,* 520 F.2d 1043 (5th Cir. 1975); *EEOC* v. *Detroit Edison Co.,* 515 F.2d 301 (6th Cir. 1975); *Rock* v. *Norfolk & Western Ry. Co.,* 532 F.2d 336 (4th Cir. 1975). Instead, the courts of appeals have prescribed a two-step procedure for Title VII class actions where class-wide issues are resolved at stage I and individual claims are addressed at stage II. *E.g.,* see *United States* v. *United States Steel Corp.,* 520 F.2d 1043, 1052-57 (5th Cir. 1975). It is at stage II that the equities of individual entitlements to back pay are determined. It is at that stage that Scott may seek to prove that an individual class member is not entitled to back pay because he knowingly and inexcusably passed up opportunities made available to him, that his award should be reduced because of the actual effects of the Memorandum on his advancement, or by establishment of some other defense not foreclosed by the court of appeals. See *United States* v. *United States Steel Corp., supra.* Accord, *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F.2d 437, 443-444 (5th Cir. 1974). This approach follows the teachings of this Court. See *Franks* v. *Bowman Transportation Co., Inc.,* —— U.S. ——, 47 L.Ed.2d 444, 466 (1976); *Albemarle Paper Co.* v. *Moody, supra.*

Since stage II has not yet been reached in the district court, there is no way the Court can review the extent to which Scott may rely on the Memorandum of Understanding to limit its financial liability for the racial discrimination it has been found guilty of. Denial of certiorari would remit this issue to the trial court, where it belongs.

**The Court of Appeals' Holding Presents No Novel or Unsettled Issues**

Although it tries to hedge on the point,[11] the petition clearly suggests that the Court of Appeals should have left the district court free to decide not to award back pay solely on the grounds that OFCC had "imposed a specific remedial plan" and that the black employees (through the all-black local union) had "knowingly and voluntarily consented to that plan" (Pet. 12).

Scott has not sought review of the Court of Appeals' ruling that virtually all of its employment practices challenged by the black plaintiffs were in flagrant violation, not only of Title VII, but of the Memorandum of Understanding itself. Therefore, Scott's petition comes to this Court in the following posture: Assuming, as is not the case here, that Scott had complied with the Memorandum,[12] should the courts consider OFCC sponsorship of The Memorandum as grounds for denying generally an award of back pay where the Memorandum on its face failed to provide discriminatees with all of the relief required by Title VII?[13]

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[11] For example, Scott disavows any assertion that OFCC's involvement "precludes an award of back pay to individuals who show that through no fault of theirs they could not benefit from [the memorandum of understanding]" (Pet. 8). We have shown in the preceding section of our argument that under the appellate ruling now remanded to the district court this inquiry is still very much open to the parties. Consequently, the question presented by the petition is premature.

[12] The Court of Appeals detailed the manner in which Scott failed to comply with the Memorandum. It failed to implement it promptly, thus rendering its limited "red circling" provisions ineffective (A. 19-22), concocted a "least educated white man" rule (A. 11, 30-33), invented a "blocking" policy (A. 22-25), executed the automatic consideration provision in a manner designed to eliminate most affected class members from benefiting from the provisions of the Memorandum (A. 10-19), failed to develop job-skipping and advanced level entry opportunities contemplated by the Memorandum (A. 40), and simply failed to correctly inform the affected class of their new rights (A. 10-19).

[13] See p. 3, *supra*.



Had this issue not been resolved by *Albemarle Paper Co.* v. *Moody, supra,* this would hardly be the appropriate case for this Court to address it because the petitioner does not challenge the Court of Appeals' finding that the Company so violated the understanding it had reached with OFCC so as to render it a "useless gesture" (A. 10). Further, every appellate court that has considered defenses invoking OFCC approval of similar remedial schemes in the paper industry have been unimpressed.[14] *E.g., Stevenson* v. *International Paper Co.,* 516 F.2d 103 (5th Cir. 1975); *Rogers* v. *International Paper Co.,* 510 F.2d 1340, 1354, n.36 (8th Cir. 1975). See also *Boles* v. *Union Camp Corp.,* 350 F. Supp. 632 (S.D. Ga. 1972).

We submit that even in its hypothetical form the question presented by petitioners has already been answered in the negative by *Albemarle Paper Co.* v. *Moody, supra; Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974); and other Title VII decisions of this Court. Scott's petition is nothing more than an attempt to reargue *Albemarle Paper Co.* v. *Moody* by implicating a federal agency in its half-hearted compliance with presidential executive orders.[15]

Both Congress and this Court have already declared that the victims of discrimination should be made whole. See *Albemarle Paper Co.* v. *Moody, supra,* 405 U.S. at 421. The petition does not deny that the Act's compensatory function would be frustrated by the result Scott seeks. Nor is it resurrecting the discredited defense of good faith, the Company lamely insists (Pet. 11). Rather, petitioner's primary argument is that inability to shield themselves

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[14] This is not surprising since OFCC has no statutory authority to interpret or enforce Title VII. See pp. 9-10, *infra.* Further, in exercising its authority under Executive Order 11246, OFCC has *never* required federal contractors to award back pay to discriminatees. See Federal Civil Rights Enforcement Effort—1974, a report of the U. S. Commission on Civil Rights, Vol. 5, p. 242 (1975).

[15] OFCC has been criticized generally for its failure to agressively execute its mandate. See U. S. Commission on Civil Rights report, *supra,* at pp. 298, 342.

from class back pay with an OFCC-approved affirmative action plan "would sharply reduce employers' incentive to follow, without litigation, government-proposed remedies . . . ." (Pet. 7). This is so, Scott suggests, because Title VII's purpose of wiping out discrimination nationwide can only be served through conciliation, and there is no incentive for employers to conciliate if they have to pay money. This Court has rejected the Company's rationale on both its predicates. Congress never intended that the parallel and overlapping remedies it provided for remedying discrimination should operate to restrict the victim's access to relief. The opposite is true. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). And given the objective of encouraging conciliation, *Moody* squarely rejects Scott's contention that exposing employers to class back pay would discourage conciliation. To the contrary:

> "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide(s) the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

405 U.S. at 417-18, quoting *United States* v. *N.L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973). Perhaps there is no better illustration of this lesson than the cavalier treatment Scott afforded black employees under the toothless Memorandum of Understanding. Would the petitioner have dared to toss off the job-skipping requirement of the Memorandum or concoct a "least-educated-white-man" rule if it knew it would have to pay for such open violations of Title VII? It is far more probable, if Scott's position were adopted, that most employees would hasten to obtain the most unobtrusive and inexpensive arrangement possible



with the least aggressive federal agency.[16] The rights of discriminatees would literally go up for auction.

But even if Scott's position about the disincentives to conciliation were plausible, it would still run afoul of this Court's teaching under Title VII. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) recognized that the independent court remedies afforded discriminatees by Congress may in some cases "tend to deter efforts at conciliation [and] weaken the [Equal Employment Opportunity] Commission's efforts to induce voluntary compliance." 421 U.S. at 461. But this Court deemed the choice "a valuable one," and said it was Congress' prerogative to resolve or not the conflicting legislative policies. 421 U.S. at 461.

In fact, Congress has established "a comprehensive scheme" in Title VII, *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. at 458, and part of it is an explicit means for employers to establish a "good faith" defense by obtaining the blessing of the EEOC.[17] 42 U.S.C. § 2000e-12(b).[18] Beyond this statutory method an employer

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[16] Conversely, no responsible agency would enter into any agreement providing less than full restitution if it knew the employer could use it as a defense to complete relief in court.

[17] OFCC and other federal compliance agencies, of course, have no statutory authority to interpret or enforce Title VII, and even the procedure for seeking EEOC interpretation of Title VII is narrowly restricted by appropriate precautions. See *Local 189* v. *United States, supra*, 416 F.2d at 997; *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir. 1971).

[18] That section states:

> (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Com-

who violates Title VII is not entitled to obtain financial exculpation from a federal agency. *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 444 (J. Rehnquist concurring).

There is absolutely no basis, therefore, for petitioner's assertion that it "had every reason to believe that it need not fear an award of class-wide back pay" if it followed the Memorandum of Understanding[19] (Pet. 10) (except, of course, to the extent the Memorandum actually relieved financial injury to black employees).

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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mission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

[19] Indeed, OFCC regulations implementing the Executive Order specifically state that:

> The regulations in this part do not apply to any action taken to effect compliance with employment practices subject to Title VII of the Civil Rights Act of 1964. 41 C.F.R. § 60-1.1.